Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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Date: May 26, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

KEVIN NICKOLS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

The petitioner, Kevin Nickols, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered on February 27, 1979.

OPINION BELOW

The Opinion of the Supreme Court of the Commonwealth of Kentucky affirming petitioner's conviction was filed on October 31, 1978, and is reported as Nickols v. Commonwealth, Ky., —— S. W. 2d —— (1979). The mandate in petitioner's case was entered by the Supreme Court of Kentucky on February 27, 1979. Copies of the above-mentioned opinion and mandate are attached hereto as appendix.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on October 31, 1978. Petitioner's timely Petition to Rehear was filed on the 20th day of November, 1978. The mandate of the Supreme Court of Kentucky was entered in petitioner's case on February 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Was petitioner denied his constitutional right to due process (a) by the refusal of the trial Court to give petitioner's tendered instruction that it was the duty of the prosecution to *prove* defendant guilty beyond a reasonable doubt, thus lessening the burden of proof upon the prosecution, and (b) by the trial Court's giving Instruction No. 1 and Kentucky's biased definition of "reasonable doubt" (this Petition, pages 6-7), over objection of petitioner, thus cleverly separating petitioner from the protections of the presumption of innocence? (pp. 7-12.)

2. Was petitioner unconstitutionally deprived of his right to due process of law by the trial Court's giving Instruction No. 1 "You will find the defendant guilty if, and only if . . ." and by giving the biased definition of "reasonable doubt" over petitioner's objection, which effectively shifted the "burden of proof" from the prosecution and permitted a conviction on less than proof beyond a reasonable doubt? (pp. 11-16.)

3. Were petitioner's due process rights under the United States Constitution violated by the trial Court in permitting the prosecution to prove on indictment for murder seven or eight other unrelated crimes and wrongdoings, over petitioner's objection, thus compelling a verdict based upon prejudice and odium against petitioner? (pp. 17-20.)

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the 14th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Kevin Nickols, was convicted of the crime of murder in the Hart Circuit Court, upon a verdict of the jury, and was sentenced by the Court to serve twenty years in the state penitentiary. (Record, pages 23 and 24.) Petitioner pleaded not guilty. Final Judgment was entered against petitioner on October 7, 1977. Notice of Appeal was filed on October 12, 1977.

On October 31, 1978, the Supreme Court of Kentucky, in an opinion to be published, with two judges dissenting, affirmed the conviction in petitioner's case. Petitioner timely filed a Petition to Rehear on the 20th day of November, 1978, and the Supreme Court of Kentucky, on the 27th day of February, 1979, denied petitioner's Petition to Rehear and the mandate was issued on that day, February 27, 1979.

The body of the decedent was found on Sunday morning, April 17, 1977, about 9:30 a.m. She had been

shot several times and was dead. The petitioner had been to her home earlier that morning. The prosecution thus proved that the petitioner had an opportunity. The prosecution attempted to prove motive on the part of the petitioner. It is fair to say that their proof of motive was equivocal.

The testimony against the petitioner was entirely circumstantial. (Opinion of the Supreme Court of Kentucky, Nichols v. Commonwealth, page 2). The area around the kitchen of the decedent's house was quite bloody. At the site of the homicide there was much physical evidence: a blood-stained rifle, a club which was similarly stained, and several spent bullets. Experts from the Kentucky State Police attempted to lift fingerprints; ballistics tests were run; the Harrison-Gilroy (Firearms Residue Test) was administered to the petitioner; the rifle was test-fired to determine whether it would emit and deposit a firearms residue upon firing; prints were lifted from the rifle, from the baseball bat, from the victim's flashlight, from the walls of the bathroom, from a chest, from a closet area, and even from the victim's purses. The upshot of all this "evidence" was that none of the discernable prints lifted matched those of the petitioner. The Harrison-Gilroy (Firearms Residue Test), administered to the petitioner within hours of the murder, proved negative. In fact, each of the tests run by the ballistics experts and by criminal detection experts proved the petitioner innocent.

The prosecution's circumstantial evidence introduced "against" the petitioner exonerated him fully.

The lab tests and their results connected someone with the commission of this crime, but not the petitioner. The prosecution was *not* able to prove by direct testimony that the petitioner was guilty of the crime charged. They were permitted to prove that the petitioner was wild socially, like many young men in their early twenties, that he had been previously apprehended with cocaine in his possession, and that he was on occasion a less than adequate driver.

The Court permitted the prosecution to show that on the morning of the death of the decedent, a loud argument took place about 3:00 to 3:30 a.m. at the home of the petitioner, some 2 (two) miles away from the decedent's home (T.E. Vol. III, p. 324, Q. 9); and that petitioner was drunk or "high" later that morning. The prosecution was permitted to prove that on the morning of the death of the decedent, the petitioner, driving recklessly, ran a man by the name of Sims off the highway (T.E. Vol. II, p. 196); that the petitioner was seen driving recklessly and squealing his tires on this day (T.E. Vol. II, p. 204); that petitioner ran William T. Long off the highway (T.E. Vol. II, pp. 206-207; T.E. Vol. II, pp. 209-210; T.E. Vol. II, pp. 211-212); that petitioner ran off the road, into, against, and through a fence (T.E. Vol. II, pp. 216-217; T.E. Vol. II, p. 226); that the petitioner was driving under the influence of alcohol, drugs, or something (T.E. Vol. II, p. 230); that petitioner had been arrested for public intoxication (T.E. Vol. III, p. 238); and that petitioner was under the influence of some sort of drug (T.E. Vol. II, p. 238).

Petitioner moved to exclude this testimony (T.E. Vol. II, pp. 243-244). Petitioner also complained of the prejudicial and inflammatory effect of this testimony on the trial of a murder indictment in his Motion and Grounds for a New Trial (Record, pages 18-21). At the end of the prosecution's case, the petitioner moved for a directed verdict of not guilty (T.E. Vol. II, p. 242). At the conclusion of all of the testimony, the Motion for a directed verdict was renewed and overruled (T.E. Vol. III, p. 346).

The trial Court gave the following instructions:

"1. You will find the Defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about the 17th day of April, 1977, and before the finding of the indictment herein, he killed MATTIE NICKOLS by shooting her with a rifle and beating her on or about her head and other parts of her body with a blunt instrument;

and

(b) That in so doing he intended to cause MATTIE NICKOLS death.

If you find the Defendant guilty, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or at life, in your discretion.

2. If upon the whole case you have a reasonable doubt as to the Defendant's guilt you shall find him not guilty.

The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether

a better case might have been proved, but whether, after hearing all of the evidence, you actually doubt that the defendant is guilty.

3. The verdict of the jury must be unanimous and be signed by one of you as foreman."

Instructions of the Court, Record, pages 13 and 14.

Petitioner objected to these instructions and moved the Court to instruct the jury as follows:

"The Court having dictated the Instructions to the Jury, Counsel for Defense objected to all instructions generally and to the Court's definition of "Reasonable Doubt," specifically, on grounds that it was redundant, which objection the Court OVERRULED.

Mr. Williams: I want to also object to Instruction #2 of the Court. And I want to move that the jury be instructed that it is the duty of the Commonwealth to prove the defendant guilty of the crime charged in the indictment beyond a reasonable doubt and if you believe from the evidence that the Commonwealth has not proven him guilty you will find him not guilty.

The Court: Mr. Williams, that is embraced in the instruction as it is written.

Mr. Williams: No, it's not. It's not the same thing at all. The meaning of these instructions here do not embrace the instruction that the defendant moves be given. There's a big difference between the jury "believing him guilty" and believing "the Commonwealth has proven him guilty"—a mighty big difference.

The Court: Well, overruled; my instruction follows the instructions of the higher court. Is there anything else?

(T.E. Vol. III, pp. 346-347).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Affirming the Trial Court's Refusal to Give an Instruction That It Was the Duty of the Commonwealth to *Prove* Defendant Guilty Beyond a Reasonable Doubt Effectively Lessened the Burden of Proof Constitutionally Incumbent Upon the Prosecution and the Giving of Instruction No. 1 and the Biased Definition of "Reasonable Doubt" Cleverly Separated Petitioner From a Trial With the Protection of the Presumption of Innocence and Conflicts With Decisions of This Court.

The instant case was tried in the Hart Circuit Court before the Supreme Court of the United States decided the case of *Taylor* v. *Commonwealth of Kentucky,* 98 S. Ct. 1930, —— U. S. —— (May 30, 1978).

The failure to accord the petitioner the right to be tried under the presumption of innocence was a clever separation of the petitioner from his rights. The highest Court in Kentucky had, on several occasions, held that it was improper for a trial Court to give an instruction on the presumption of innocence, because such an instruction was unauthorized and because it was too favorable to the defendant. *Swango* v. *Commonwealth,* 291 Ky. 690, 165 S. W. 2d 182 (1942); *Brown* v. *Commonwealth,* 198 Ky. 663, 241 S. W. 777; *Mink* v. *Commonwealth,* 228 Ky. 647, 15 S. W. 2d 463. *Palmore and Lawson, Kentucky Instructions to Juries,* October, 1974, Vol. 1, W. H. Anderson Co., Cincinnati, Ohio.

The highest Court in Kentucky, in the *Swango* case, said in reference to the motion of a defendant for an instruction on the presumption of innocence:

> "As a matter of fact the identical instruction which counsel for appellant set out in their brief and contend should have been given was condemned by this court in Com. v. Stites, 190 Ky. 402, 227 S. W. 574."
>
> *Swango* v. *Commonwealth,* 291 Ky. 690, 165 S. W. 2d 182 at page 183.

The highest appellate Court in Kentucky in *Taylor* v. *Commonwealth,* Ky., 551 S. W. 2d 813 (1977) said:

> "The well-established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary . . . . We find no reason to change the established law on this point." *Taylor* v. *Commonwealth,* Ky., 551 S. W. 2d 813, (1977), at page 814.

Kentucky, in order to compensate for its failure to require an instruction on the presumption of innocence, had enacted Rules of Criminal Procedure (1975), provision 9.56, which provided:

> "The jury shall be instructed that if there is a reasonable doubt of the defendant's being *proved* to be guilty, he is entitled to an acquittal. . . ."
>
> Kentucky Rules of Criminal Procedure, 9.56 (effective 7-1-75) (Emphasis supplied).

This has been the law of Kentucky for more than 100 years and, before the enactment of the Rules of Criminal Procedure, was Section 238 of the Criminal Code of Practice of Kentucky. Before that it had been the Criminal Code of 1877, Section 237.

Thus, Kentucky had adopted a back-door, indirect method of according an accused in a criminal case the presumption of innocence as required by the Due Process Clause. The implication of Rule 9.56 (1975) which put the duty upon the prosecution to *prove* guilt of the accused beyond a reasonable doubt was plain. In the event the prosecution did not prove the defendant guilty beyond a reasonable doubt, the defendant was entitled to an acquittal, the presumption of innocence not having been rebutted.

In the instant case, the Court refused to give the instruction moved for by the petitioner requiring the prosecution to prove the petitioner's guilt beyond a reasonable doubt. (T.E. Vol. III, pp. 346-347).

The trial Court relied upon the amended version of Rule 9.56, effective July 1, 1976, which deleted the words "proved beyond a reasonable doubt" and substituted "if upon the whole case." The effect of this substitution was to undermine 184 years of judicial protections for Kentucky citizens by lessening the burden of proof borne by the Commonwealth in all criminal cases. After the pronouncement of these 1976 Rules, the presumption of innocence has all but expired in the Kentucky Courts.

This subtle separation of the petitioner from his right to be tried under the presumption of innocence is one of those stealthy encroachments of the rights secured by the Amendments to the United States Constitution as condemned in *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261 at page 263, wherein this Court said:

> "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261 at page 263.

In the case of *Taylor* v. *Kentucky,* 98 S. Ct. 1930 at page 1935, this Court said:

> "While use of the particular phrase "presumption of innocence"—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' Estelle v. Williams, 425 U. S. at 503, 96 S. Ct. at 1693." (emphasis added).
>
> *Taylor* v. *Kentucky,* 98 S. Ct. 1930 at page 1935 (1978).

II. The Decision Below Affirming the Trial Court's Giving Instruction No. 1 and Defining "Reasonable Doubt" Over the Objection of the Petitioner Shifted the Burden of Proof From the Prosecution and Permitted a Conviction Based on Less Than Proof Beyond a Reasonable Doubt in Violation of Decisions of This Court.

In Petitioner's case the Court gave Instruction No. 1: "You will find the defendant guilty if, and only if,". This instruction adroitly shifted the burden of proof from the shoulders of the prosecution where the burden

to prove every essential fact necessary to establish the commission of a crime beyond a reasonable doubt rested. The Court, in the instant case, refused to give the Instruction: "It is the duty of the Commonwealth to prove defendant guilty of the crime charged in the indictment beyond a reasonable doubt." T.E. Vol. III, pp. 346-347.

In order to cast the burden of proof upon the Commonwealth and keep it there during the entire trial, the instruction should have been couched in language such as: "If you shall find and believe from all facts and circumstances proved in evidence to the exclusion of a reasonable doubt that the defendant did . . . ." To use the language in the instruction, "You will find the defendant guilty if, and only if . . .," shifts the burden from the Commonwealth. It effectively deprives the defendant of the presumption of innocence and it shifts the duty which rests on the Commonwealth to prove every essential fact in proving guilt beyond a reasonable doubt.

To demonstrate the fallacy in the instruction, an example from the civil law might prove to be of benefit: If suit has been brought on a note and defendant denied that he owed the note, the instruction would read: "If you believe from the evidence that the defendant, on the 6th day of July, 1976, did execute and deliver to the plaintiff his certain promissory note, etc. you will find for the plaintiff." This instruction places the burden of proof on the plaintiff. If the plea of the defendant is payment, in which event the burden is placed on the defendant, the instruction should read: "You will find

for the plaintiff unless you believe from the evidence that the defendant paid the amount of said note which was accepted by the plaintiff as payment, etc." This instruction places the burden of proof on the defendant. The illustration given shows that Instruction No. 1 given by the Court *to find the defendant guilty if, and only if,* shifted the burden of proof from the shoulders of the Commonwealth to the petitioner. Thus, petitioner was deprived of a fair trial and of due process under the Fourteenth Amendment to the United States Constitution.

As Mr. Justice Frankfurter noted in 1960:

> "One of the rightful boasts of western civilization is that the state has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused of all the safeguards of a fair procedure."
>
> *Irvin* v. *Dowd,* 366 U. S. 717, 721, 81 S. Ct. 1639, 1646.

In the case of *Flaxer* v. *United States,* 358 U. S. 148, 79 S. Ct. 191 at page 193, Mr. Justice Douglas, speaking for a majority of the Court said:

> "We stated in Watkins v. United States, 354 U. S. 178, 208, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, in reference to prosecutions for contempt under this act that "The courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases." One of these guarantees is proof beyond a reasonable doubt that the refusal of the witness was deliberate and intentional, as

Quinn v. United States, 349 U. S. 155, 165, 75 S. Ct. 668, 99 L. Ed. 964, holds."

Mr. Justice Douglas in *Flaxer* v. *United States*, 358 U. S. 148, 79 S. Ct. 191, 193.

In the case of *United States* v. *Fleischman*, 70 S. Ct. 739 at page 746, the Court said:

"Respondent does not lose the presumption of innocence that surrounds the defendant in a criminal prosecution. That presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt . . . ."

United States v. *Fleischman*, 339 U. S. 349, 363, 70 S. Ct. 739 at page 746.

In the case of *Johnson* v. *Florida*, 391 U. S. 596, 88 S. Ct. 1713 at page 1714, the Court said:

"The burden, however, is on the State to prove that an accused has committed an act bringing him within a criminal statute."

Johnson v. *Florida*, 391 U. S. 596 at 598, 88 S. Ct. 1713 at page 1714.

In the case of *Mullaney* v. *Wilbur*, 421 U. S. 690, 95 S. Ct. 1881 at page 1890, the Court said in speaking through Mr. Justice Powell:

"The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction, and because

of the certainty that he would be stigmatized by the conviction . . . ."

And again on page 1891:

"The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential."

And again on page 1892:

"We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."

Mullaney v. *Wilbur*, 421 U. S. 684, at pp. 699, 700, 701, 704, 95 S. Ct. 1881 at pages 1890, 1891 and 1892.

In the case of *In Re Winship*, 397 U. S. 358, 90 S. Ct. 1068, the Court had before it a juvenile offender from the State of New York who had been convicted in the juvenile court (or family court as it was called in New York) of a crime. The New York Statute provided that an infant could be convicted of the crime in the family court by a preponderance of the evidence. This case was appealed to the Supreme Court of the United States and reversed, and the Court said at page 1073:

"Due process commands that no man shall lose his liberty unless the government has borne the burden of . . . convincing the factfinder of his guilt."

They also said on page 1073:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."
>
> *In Re Winship,* 397 U. S. 358 at page 366, 90 S. Ct. 1068 at page 1073.

The definition of "reasonable doubt" as given by the Court was probably well-intentioned, but was a clever invention to cut down the petitioner's rights to due process, derogating from the due process right of presumption of innocence, derogating from the obligation of the prosecutor to prove the commission of the crime beyond a reasonable doubt, and derogating from the prosecution's duty to prove every essential fact necessary for the commission of the crime by a burden of proof which has always been beyond a reasonable doubt.

By its definition of "reasonable doubt" the trial Court seemed to excuse the Commonwealth for not proving a better case—another stealthy encroachment and depreciation of the rights guaranteed by the Constitution and denounced in *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261 at page 263.

III. The Decision Below Affirming the Trial Court's Permitting Proof of Seven or Eight Other Crimes Against Petitioner on Trial for Murder Over Petitioner's Objections, Deprived Petitioner of a Fair Trial Under the Due Process Clause of the U. S. Constitution, and Conflicts With Decisions of This Court.

The universal preference of prosecutors for proving other crimes or misdemeanors in addition to the crime charged was permitted by the trial Court over the objections of the petitioner.

The case before the Court is a classic example of the prosecution's inability to connect petitioner with any of the evidence which proved someone guilty of the crime charged. Failing so to connect him, the prosecution was permitted to prove, over objections of the petitioner, that petitioner was guilty of a host of other crimes and wrongdoings. The jury had before it proof that the petitioner was an unworthy and less than upstanding citizen, but no proof that he was in fact a murderer. Thus, the jurors, having heard such "evidence," were compelled to conclude that petitioner himself was so odius that his right to due process did not merit their most careful consideration.

The introduction into evidence of the other wrongdoings committed by the petitioner on the day of the finding of decedent's body (see pages 4-7 of this Petition) introduced into the deliberations of the jury an odium against the petitioner which effectively undermined not one but *all* of his due process rights under the U. S. Constitution to a fair trial.

It is well known by prosecutors, as well as defense attorneys, that juries cannot handle proof of other crimes. Such evidence not only invites a verdict based on prejudice, but compels one of guilt. This device has been known and used by prosecutors for at least nineteen hundred years. It was the same procedure used in the trial of Jesus of Nazareth when:

> "And the high priests kept heaping accusations upon him." *Mark XV:3.*

This device of proving unrelated crimes and misdoings has come to be the most important method of *our time* for depriving those accused of crime of their due process rights to a fair trial under the United States Constitution.

It is effective and it has come to be used universally.

Although a defendant is accorded all of his due process rights: The right to remain silent; to have counsel; to confront the witnesses against himself; the right to cross-examine the witnesses against him; the right to trial by jury; and all the rest, when the trial judge permits the prosecution to prove the commission of seven or eight other crimes and wrongdoings and does not confine the proof of facts to establishing guilt or innocence, a mockery is made of the due process rights to a fair trial. One gets exactly what happened in this case—a verdict based on prejudice and odium.

This strategem introduced into the proceedings the spirit of the Spanish Inquisitions. The technique of unrelated and runaway proof has no place in a trial

under the mandates of the Constitution of the United States.

An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on guilt or innocence. *Bruton* v. *U. S.,* 391 U. S. 123, 89 S. Ct. 1620 (1968).

Mr. Justice Black said in *Chambers v. State of Florida,* 309 U. S. 227, 235, 60 S. Ct. 472 at 476 and 477:

> "[3] Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crimes by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, tor-

ture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of *prejudice, passion, excitement* and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

Chambers v. *State of Florida,* 309 U. S. 227, at pages 235-237, 60 S. Ct. 472 at pages 476-477. (emphasis supplied)

We submit that this practice of introducing odium and the stigma of other violations of law against an accused has become a universal practice in the several states as the method of preference for prosecutors who would achieve verdicts outside the bounds of Due Process of Law and thus compel guilty verdicts based upon prejudice, odium and stigma. This prosecutorial practice violates "fundamental principles of judicial fair play."

This problem presents a substantial Federal question.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX

RENDERED: OCTOBER 31, 1978

SUPREME COURT OF KENTUCKY

78-SC-39-MR

KEVIN NICKOLS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - *Appellee*

MEMORANDUM OPINION PER CURIAM AFFIRMING

Kevin Nickols appeals from a judgment of the Hart Circuit Court finding him guilty of the murder of his grandmother, Mattie Nickols, and sentencing him to imprisonment for 20 years.

The body of Mattie Nickols was found on the porch of her home by Clint Nickols, appellant's brother, on Sunday, April 17, 1977, at 9:30 a.m. The police were alerted and during the course of their investigation found a flashlight and a sack of potatoes on the porch. A .22-caliber rifle and a miniature baseball bat were found in a corner inside the decedent's house. There was a trail of blood throughout the house and the area where Mattie's purses were kept had been ransacked. The pathologist who conducted the autopsy on the decedent was of the opinion that Mattie had sustained multiple blows to the head by a blunt instrument, as well as a fatal gunshot wound to the head. He concluded that the time of death was 8 a.m. A ballistics expert testified that the .22 rifle was the murder weapon.

The evidence linking appellant to the murder was wholly circumstantial. Kevin testified that he left home about 7:35 or 7:40 a.m., on the day of the murder and drove four miles

to his grandmother's to feed the cats and get some potatoes. According to Kevin, he stayed approximately 25 minutes, then returned home, only to leave again to visit his girl friend in Canmer, Kentucky. Approximately one hour later he lost control of his car and crashed through a fence on Gus and Blanche Rock's farm. The accident occurred less than four miles from the decedent's house. The Rocks called the police, who informed them that Mattie Nickols was dead. Blanche testified that Gus told Kevin that his grandmother had been "found dead" and the Kevin "didn't make any emotion whatsoever." Kevin was arrested at 10:40 a.m., for public intoxication, and according to the arresting officer, Kevin stated that "he had heard that his grandmother had been killed."

The police investigation failed to find any fingerprints linking appellant to the crime, nor was there any blood residue on his clothing or shoes. A firearms residue test administered also yielded negative results.

Appellant's initial assignment of error arises out of certain statements made by the prosecutor during his opening statement:

> Now, in any case of murder one of the first things you ask is, "What is the motive?" That is something we can't tell you. We do have this evidence to introduce: The defendant, Kevin Nickols, told Detective Dodson that he had to come up with two thousand dollar ($2,000) by the following Friday in order to avoid going to jail in Bowling Green, Kentucky on a cocaine conviction. . . .

Counsel for appellant objected at once, and the trial judge admonished the jury to disregard entirely what Kevin said to Detective Dodson. Appellant's counsel then moved for a mistrial, claiming the error could not be cured by admonition. The motion was overruled, as was appellant's

later motion to exclude Dodson's testimony relating to the fine and conviction. Appellant asserts that reference to the cocaine conviction in the prosecutor's opening statement was so prejudicial and inflammatory as to constitute reversible error. We disagree.

It is a fundamental rule that evidence of a defendant's prior criminal acts is inadmissible in a trial for a separate unrelated offense. Appellant's reliance on *Pankey* v. *Commonwealth*, Ky., 485 S. W. 2d 513 (1972), is therefore correct insofar as that case supports the general rule. However, the court in *Pankey* recognized certain "narrow purposes" for which evidence of prior crimes is admissible: "to show *motive*, intent, guilty knowledge, plan or system." *Id.* at 526 (emphasis added). The basic reason for these universally recognized exceptions to the general rule is that in these instances evidence of prior convictions bears such a close relationship to the offense charged that its probative value greatly outweighs its prejudicial effect. *See Jones* v. *Commonwealth*, Ky., 554 S. W. 2d 363, 366-68 (1977); *Quarles* v. *Commonwealth*, Ky., 245 S.W. 2d 947, 948-49 (1952).

In this case the Commonwealth made it abundantly clear that any reference to appellant's prior felony was for the purpose of showing motive.[1] The record shows that the decedent was killed in what appeared to be a robbery attempt. The fact that Kevin needed $2,000 to avoid incarceration was certainly highly probative on the issue of motive. The prosecution is allowed wide latitude in ascertaining motive, *Rake* v. *Commonwealth*, 450 S. W. 2d 527, 528 (1970), and it was not error for the prosecution to refer to the fact that appellant owed a fine for the commission

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[1]Appellant's citation of Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 (1970), is erroneous. That case involved the admissibility of prior felonies to impeach credibility, an issue not before us here.

of a prior crime. However, we must still determine whether identification of the offense as a "cocaine conviction" constituted prejudicial error. It is our opinion that it did not. *Richards* v. *Commonwealth*, Ky., 517 S. W. 2d 237 (1974), *cert. denied*, 422 U. S. 1010 (1975); *Jones* v. *Commonwealth*, Ky., 62 S. W. 2d 56 (1933).

We conclude that Dodson's testimony regarding Kevin's prior conviction and the need for money to pay the fine was admissible to show motive for the commission of the crime at issue. "When proof of another crime is admissible under this rule, the fact that it may tend to prejudice the defendant in the minds of the jurors is not grounds for its exclusion." *Shepperd* v. *Commonwealth*, Ky., 322 S. W. 2d 115, 117 (1959). We add that any possible prejudice created by identification of the prior crime was effectively dissipated by the trial court's admonition.

The other assignment of error, raised in appellant's supplemental brief, is that the instructions given by the trial court deprived appellant of a fair trial and due process of law, citing *Taylor* v. *Commonwealth*, ____ U.S. ____, 98 S. Ct. 1930 (1978). Appellant's argument is not based upon the failure of the trial court to give an instruction on the presumption of innocence, (indeed, appellant never requested such an instruction), but rather upon the wording of the instructions and the definition of reasonable doubt. The form of instructions, including the definition of reasonable doubt, given in the case at bar is substantially the same as that used in *Taylor*. Although those instructions were criticized in *Taylor*, this court only recently made it clear that we refuse to hold them constitutionally fatal until the Supreme Court of the United States sees fit to do so. *Whorton* v. *Commonwealth*, Ky., ____ S. W. 2d ____ (1978).

The judgment is affirmed.

All concur except Palmore, C. J., and Stermberg, J., who dissent.

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OPINION RENDERED: OCTOBER 31, 1978

SUPREME COURT OF KENTUCKY

File No. 78-SC-39-MR

KEVIN NICKOLS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Hart Circuit Court
Action No. 3426

MANDATE—Issued February 27, 1979

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

February 27, 1979 Appellant's Petition for Rehearing Denied.

(s) Martha Layne Collins
Clerk

A Copy—Attest

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

COUNTERSTATEMENT OF THE CASE

On September 12, 1977, the Grand Jury of Hart Circuit Court charged Kevin Nickols, the petitioner here, with the murder of Mattie Nickols on April 17, 1977 (Transcript of Record 3 [hereinafter cited as "TR"]). Trial was held on September 27, 1977 (Transcript of Evidence 1 [hereinafter cited as "TE"]) in the course of which the following testimony was heard.

Kevin Nickols was one of Mattie Nickols grandchildren (TE 248). On April 17, 1977, Kevin left his mother's house where he resided (TE 248) at 7:35 or 7:40 in the morning and went to his grandmother's (TE 249). He slipped the catch on the porch door

(TE 249) and knocked on the kitchen door (TE 250). He stayed for about twenty-five minutes (TE 250).

He came to feed the cats and obtain some potatoes stored in the cellar (TE 252). He used a flashlight in the cellar (TE 252). According to Kevin, he then returned home and waited for the Sunday paper to arrive but then decided at 8:40 or 8:45 to visit his girlfriend at Canmer, Kentucky (TE 254). She was not at home so Kevin returned to Munfordville (TE 255). On the way back, Kevin lost control of his car (TE 257). It left the road, went through a fence and landed in a field (TE 257-258). Despite his efforts to get his car moving again (TE 259), Kevin was unsuccessful (TE 260). The owner of the farm notified the police (TE 260) who arrived shortly thereafter (TE 261).

Raymond Overstreet, a Kentucky State Policeman (TE 234), investigated the homicide of Mattie Nickols (TE 236). At about 10:40 a.m., he was informed about Kevin's accident (TE 236). When he arrived at the scene of the accident, he observed that Kevin was in an apparent state of intoxication (TE 238). Trooper Overstreet informed Kevin that his grandmother "had been found dead" (TE 239), to which Kevin replied, ". . . [H]e had heard that she had been killed" (TE 239).

Earlier that morning, at 9:30 a.m., Clint Nickols, appellant's brother, went to Mattie's home (TE 39-40). When he looked in the porch door, he saw his grandmother lying on the floor (TE 41). He saw a .22 caliber rifle and a toy ball bat (TE 43). The bedroom had been ransacked (TE 43). The rifle belonged to Clint and

Kevin (TE 43). It was in its usual location (TE 44). Clint called for an ambulance (TE 42).

Raymond "Bucky" Day and Derek Bowman received the ambulance call at about 9:30 a.m. (TE 51). Day examined Mattie and found her dead (TE 51). He called the police (TE 51). Detective Bill Dodson of the Kentucky State Police responded to the call (TE 56). He arrived at Mattie's at about 10:30 a.m. (TE 56).

He saw Mattie's body on the porch (TE 56-57). In her hand was a paper towel (TE 57-58). By her side was a walking stick (TE 57). It appeared to Detective Dodson that Mattie had been beaten about the head and she had walked about the house leaving a trail of blood (TE 58). There was blood all over the house (TE 45). Only the bedroom in which her purses were kept was ransacked and the rest of the house was in order (TE 58-59). Detective Dodson also saw a sack of potatoes and a flashlight on the porch (TE 60). The bat and flashlight appeared to have blood on them (TE 60). The rifle, several spent casings, several live rounds, several slugs, the flashlight, toy bat, and pieces of screen were taken into custody (TE 60-66). Dodson was unable to find any fingerprints of value (TE 89-96).

Detective Dodson took a statement from Kevin (TE 68). In this statement, Kevin repeated that at about 8:00 a.m. he had gone to Mattie's to pick up some potatoes and feed her cats (TE 69). Kevin was quite nervous during the interview (TE 70). Kevin could not remember if he brought the sack of potatoes home

with him (TE 71). Kevin admitted to needing $2,000 by Friday to pay a fine imposed on him (TE 74). Kevin said that Mattie refused to give him the money although she would always help Clint (TE 75).

William M. Carney, M.D., a pathologist, conducted an autopsy on Mattie (TE 130). He found that she had received multiple blows to the top of the head inflicted by a blunt instrument (TE 132). These blows resulted in multiple skull fractures (TE 133). He also found gunshot wounds to the head (TE 133) passing through the brain (TE 134) and body (TE 134-135). Death was caused by the gunshot wound to the head (TE 138) and occurred at 8:00 a.m. (TE 139).

Glenn Baxter, a firearms examiner, testified that the fatal bullets were fired from the .22 caliber rifle (TE 182-183). He also stated that the bullets were fired through a wire mesh, but he could not positively state that it had gone through the wire screen on the porch door (TE 185).

At the close of the Commonwealth's case, petitioner testified. The jury was instructed (TR 13-14). It found Kevin guilty of murder and fixed his punishment at 20 years imprisonment (TE 395). Judgment of conviction and sentence was imposed upon petitioner (TR 23-24) and an appeal was taken (TR 25). The judgment of conviction and sentence was affirmed by the Supreme Court of Kentucky in an unreported case styled, *Nickols* v. *Commonwealth,* No. 78-SC-38-MR (Ky. Sup. Ct., Oct. 31, 1978). A Petition for Rehearing was filed and denied on February 27, 1979. A Petition for Certiorari has been filed.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. The Issues Presented Are Not Sufficiently Important to Warrant This Court's Attention.

A. The Difference in Wording Between the Instruction Given and the Instruction Requested Is Insignificant.

The trial court instructed the jury to find the petitioner guilty if, and only if, ". . . you [the jury] *believe* from the evidence beyond a reasonable doubt all of the following . . . [elements of the crime of murder]." Petition, at 6. (Emphasis supplied.) The petitioner's first argument is that it was constitutional error to use the word, "believe":

> "Mr. Williams: '. . . The meaning of these instructions here do not embrace the instruction that the defendant moves be given. There's a big difference between the jury 'believing him guilty' and believing the 'Commonwealth has proven him guilty'—a mighty big difference.'" Petition, at 7.

The difference of which the petitioner speaks becomes extinguished when the word, "believe," is read in context; *i.e.,* that the jury believe *from the evidence.* Accordingly, it is unlikely that the jury was mislead into a misunderstanding that a finding of guilty could be had upon unfounded belief rather than evidence.

Petitioner's reference to the amendment of Kentucky Rule of Criminal Procedure 9.56, see Petition, at 9, and its requirements *vis-a-vis* the wording of instructions raises only a question of State law.

B. The Use of the Phrase, "If, And Only If," Does Not Shift the Burden of Proof.

The Trial court instructed the jury to:

> ". . . [F]ind the Defendant guilty if, and only if you believe from the evidence beyond a reasonable doubt all of the following . . . [elements of the crime]." Petition, at 6.

The Petitioner suggests that the phrase, "if, and only if," adroitly shifts the burden of proof to the defendant, Petition, at 11-12. The phrase emphasized the burden of the Commonwealth to prove guilt beyond a reasonable doubt. If this shifts the burden, the shift is done so very adroitly that it is beyond this counsel's understanding.

C. Proof of Petitioner's Traffic Mishaps and His Mental Condition Was a Part of the *Res Geste* of the Crime.

The petitioner alleges that the prosecution erroneously adduced evidence of other offenses to buttress its case. The offenses are set forth in Petition, at 5. Only a brief summary of the Commonwealth's case is necessary to demonstrate the admissibility of the evidence.

It was the Commonwealth's theory that petitioner went to his grandmother to obtain money. When she refused, he beat her. Blood in the house demonstrated that after the victim was beaten, she wandered around the house and attempted to make a phone call. The rifle which was used in the killing was frequently used by the petitioner and was returned to its usual position after being used. The evidence of petitioner's traffic

mishaps was used to demonstrate his location at various times so as to show his initial arrival, departure, and return to his grandmother's home.

CONCLUSION

This petition does not raise any substantial questions of federal law which merit review by this Court and should, therefore, be denied.

Respectfully submitted,

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IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, Mark F. Armstrong, Esq., counsel for respondent, hereby certify that the attached Memorandum in Opposition to Petition for Writ of Certiorari to the Supreme Court of Kentucky was served on petitioner by depositing three copies of the aforementioned document in the United States mail, first-class postage prepaid, on June 25, 1979, addressed to petitioner's counsel, Jon W. Goodman, Esq., Box 325, Munfordville, Kentucky 42765. This service constitutes service on all parties required to be served.

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